

The Honorable Michelle L. Peterson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

O'DONNELL/SALVATORI, INC., an Illinois
corporation,

Plaintiff/Counterclaim
Defendant,

v.

MICROSOFT CORPORATION, a Washington
corporation,

Defendant/Counterclaim
Plaintiff.

NO. 2:20-cv-00882-MLP

**DECLARATION OF MARK
LAWRENCE LORBIECKI IN
SUPPORT OF
O'DONNELL/SALVATORI, INC.'S
MOTION TO COMPEL MICROSOFT
CORPORATION TO PROVIDE
FURTHER SUPPLEMENT ANSWERS
AND RESPONSES TO
O'DONNELL/SALVATORI, INC.'S
FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION,
AND FURTHER PRODUCTION OF
DOCUMENTS**

**NOTED ON MOTION CALENDAR:
March 26, 2021**

I, Mark Lawrence Lorbiecki, declare as follows:

1. I am an attorney for Plaintiff/Counterclaim Defendant O'Donnell/Salvatori, Inc. ("ODS") in the above-entitled action. I make this declaration based on personal knowledge, am over the age of 18 and competent to testify.

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O'DONNELL/SALVATORI, INC.'S FIRST SET OF
INTERROGATORIES AND REQUESTS FOR PRODUCT - 1
(2:20-cv-00882-MLP)

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2. Microsoft and ODS have had multiple meet and confer conferences via phone.

3. Attached as **Exhibit A** is a true and correct copy of Plaintiff/Counterclaim Defendant O'Donnell/Salvatori, Inc.'s First Set of Interrogatories and Requests for Production to Defendant/Counterclaim Plaintiff Microsoft Corporation, dated and served on July 29, 2020.

4. Attached as **Exhibit B** is a true and correct copy of Microsoft Corporation's Answers, Responses, and Objections to O'Donnell/Salvatori, Inc.'s First Set of Interrogatories and Requests for Production, dated and served on August 28, 2020.

5. ODS and Microsoft held their first meet and confer on September 7, 2020. During the first meet and confer conference, some issues were indeed resolved, but ODS left the conference with a myriad of still unfulfilled Interrogatories and Requests for Production.

6. Attached as **Exhibit C** is a true and correct copy of a letter to Microsoft's counsel from Mark Lawrence Lorbiecki, dated September 8, 2020.

7. Attached as **Exhibit D** is a true and correct copy of a letter to ODS's counsel from Ambika K. Doran, dated September 18, 2020.

8. Attached as **Exhibit E** is a true and correct copy of a letter to ODS's counsel from Ambika K. Doran, dated October 7, 2020.

9. Attached as **Exhibit F** is a true and correct copy of a letter to Microsoft's counsel from Mark Lawrence Lorbiecki, dated October 16, 2020.

10. The Parties had a second meet and confer conference on November 11, 2020 in which, again, some progress was made but, again, many Interrogatories and Requests for Production were still in contention after the conference.

11. Attached as **Exhibit G** is a true and correct copy of a letter to Microsoft's counsel from Mark Lawrence Lorbiecki, dated January 28, 2021.

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SUPPLEMENT ANSWERS AND RESPONSES TO
O'DONNELL/SALVATORI, INC.'S FIRST SET OF
INTERROGATORIES AND REQUESTS FOR PRODUCT - 2
(2:20-cv-00882-MLP)

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1 12. Attached as **Exhibit H** is a true and correct copy of an email exchange between
2 Mark Lawrence Lorbiecki and Ambika K. Doran, dated February 10, 2021 and February 12,
3 2021, respectively.

4 13. Attached as **Exhibit I** is a true and correct copy of a letter to ODS's counsel from
5 Ambika K. Doran, dated February 12, 2021.

6 14. The above letter resolved minimal discovery issues and was not fully responsive
7 or receptive to ODS's discovery needs.

8 15. Attached as **Exhibit J** is a true and correct copy of Microsoft Corporation's
9 Supplemental Answers to O'Donnell/Salvatori, Inc.'s Interrogatories Nos. 1-3 (Contains
10 Confidential Materials Subject to the Stipulated Protective Order, dated March 9, 2021.
11 Confidential material has been redacted, pursuant to the Stipulated Protective Order entered in
12 his action.

13 16. Since February 10, 2021, ODS has requested deposition dates for three key
14 witnesses. Microsoft has not responded but has simply ignored the request. Attached as
15 **Exhibit K** is a true and correct copy of an email exchange between Ambika K. Doran and Mark
16 Lawrence Lorbiecki, dated March 8-10, 2021.

17 17. The two meet and confer conferences we've had with Microsoft's counsel have
18 proved minimally helpful with regard to ODS's First Discovery Requests.

19 18. ODS's counsel has no reason to believe that another meet and confer would
20 resolve the pressing discovery issues.

21 19. Microsoft's counsel has had *seven (7) months* to "confer" and "follow-up" with
22 their client and ODS can no longer wait. Because the contractual rights to contingent
23 compensation necessarily required ODS to repose "trust and confidence" in Microsoft to account
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O'DONNELL/SALVATORI, INC.'S FIRST SET OF
INTERROGATORIES AND REQUESTS FOR PRODUCT - 3
(2:20-cv-00882-MLP)

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1 for the revenues received, and because such revenues and their sources are in the exclusive
 2 knowledge and control of Microsoft, the contract and amendments place a duty, at least with
 3 respect to accounting to ODS for the gross revenues received. There exists to vehicle outside of
 4 discovery to allow ODS to ascertain what it is owed.

5 20. Regarding the pre-September 2010 royalty records, Microsoft has only stated that
 6 it is burdensome and costly to produce those archived records in their old database system. The
 7 ICA was effectuated in October 1, 2001—approximately nine (9) years records are missing.

8 21. Attached as **Exhibit L** is a true and correct copy of Microsoft Corporation’s ESI
 9 Disclosures, dated December 30, 2020.

10 22. The only reports ODS has received are from Sumthing Else Music Works and
 11 Sumthing Else Distribution.

12 23. Given the minimal number of documents produced, ODS is skeptical that
 13 Microsoft has comprehensively produced documents responsive to Request for Production
 14 No. 8.

15 24. Derivation has been one of the key issue herein. A derivative work is one which
 16 both copies and changes somewhat the nature of the copied work. The ICA and its amendments
 17 include such as revenue events. Microsoft has been unwilling to disclose such. Yet, ODS has
 18 become aware of such derivative works. This Court has already quoted, with approval, from *Wolf*
 19 *v. Superior Court* (2003) 107 Cal.App.4th 25, 130 Cal.Rptr.2d 860 (*Wolf*), Therein, the Court
 20 observed that, “in contingent compensation and other profit-sharing cases where essential
 21 financial records are in the exclusive control of the defendant who would benefit from any
 22 incompleteness, public policy is best served by shifting the burden of proof to the defendant,
 23 thereby imposing the risk of any incompleteness in the records on the party obligated to maintain

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 O’DONNELL/SALVATORI, INC.’S FIRST SET OF
 INTERROGATORIES AND REQUESTS FOR PRODUCT - 4
 (2:20-cv-00882-MLP)

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1 them.” (*Id.* at p. 35, 130 Cal.Rptr.2d 860.) Because it is Microsoft and its wholly owned
 2 subsidiary that holds the works and the records of the works, ODS might only be aware of the
 3 tip of the iceberg relative to derivative works.

4 25. To that end, ODS notes that ODS has served three discovery requests that use the
 5 term “derivative works” or “derivative use.” Among other objections, Microsoft objected that
 6 the terms “derivative works” and “derivative use” are technical terms under the Copyright Act
 7 that often require expert testimony. On September 14, 2020, counsel for Microsoft stated that
 8 counsel was “still working on a proposal” to disclose derivative works. In fact, no real disclosure
 9 or certification has taken place. Without such disclosure, ODS cannot meaningfully develop its
 10 case for collecting revenue use of these derivative works trigger.

11 26. ODS is aware that Microsoft commissioned artists to produce note-for-note
 12 covers of Halo compositions and “Halo Legacy” works to avoid making payments to ODS, but
 13 neither acknowledged these as the derivative works they truly are, nor paid ODS royalties for
 14 these works. Microsoft proposed as a compromise to produce the requested information as to
 15 “musical compositions by anyone other than ODS or its principals in which Microsoft has in
 16 writing thanked or credited ODS or its principals,” specifically identifying the following works
 17 wherein the following were noted:

- 18 • Works in which ODS or its principals have been credited in some fashion:
 - 19 ○ Halo Wars
 - 20 ○ Halo Legends
 - 21 ○ Halo 1 Anniversary
 - 22 ○ Halo 2 Anniversary
- 23 • Works in which ODS or its principals have been thanked:

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 INTERROGATORIES AND REQUESTS FOR PRODUCT - 5
 (2:20-cv-00882-MLP)

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- Halo 4
- Halo 5 Guardians

27. This list is clearly incomplete and with Microsoft's knowledge. Microsoft has specifically withheld information as to derivative works. Consider, for example, the interview published at:

- <https://www.halowaypoint.com/en-us/news/joel-corelitz-through-the-trees>

wherein the composer Joel-Corelitz admits to drawing on a piece of music from the original Halo: Combat Evolved and Corelitz unpacked the musical evolution, "'Through the Trees' is my interpretation of 'A Walk in the Woods.'" To realize its ambitious vision for Halo Infinite, "343 Industries music supervisor Joel Yarger has assembled a trio of talented composers to develop stirring, emotional melodies that blend their unique styles with nearly twenty years of iconic motifs." These are derivative works by Microsoft.

28. Composer Gareth's Escharum admits use of the main Halo theme in "Set a Fire in Your Heart." Further, Corelitz discussed the power of previous Halo music, "Halo has a very strong musical identity. So strong, that you could hear just a few seconds of a Halo score playing from another room and recognize it." The new song actually draws off a piece of music from the original Halo: Combat Evolved and Corelitz unpacked the musical evolution, "'Through the Trees' is my interpretation of 'A Walk in the Woods.'"

29. "Being able to pull from Halo's rich musical identity as a composer – to integrate its themes and express them in my voice was a new experience and a real honor. And having all of Halo's themes at my fingertips was a constant source of inspiration and a lot of fun."

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O'DONNELL/SALVATORI, INC.'S FIRST SET OF
INTERROGATORIES AND REQUESTS FOR PRODUCT - 6
(2:20-cv-00882-MLP)

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1 30. In another interview, another composer, Mr. Curtis Schweitzer, admits:

2 In my own track, I tried to take the Halo theme – a theme that is often
3 played monophonically, or simply with one part – and simplify that
4 melody down to its essential “pieces” so that the harmonization can play
5 a more prominent role, and to give some room to develop a few
6 “fragments” of my own (for example, you can hear a little bit of the
7 trumpet motif that played in the Discover Hope trailer in the piano part).
8 In other words, my approach here was keeping the backbone of the piece
9 rooted firmly in the Halo theme, but presenting it in a new way.

10 31. At [https://podcasts.apple.com/us/podcast/hybrid-vs-owen-pallett-feat-gareth-](https://podcasts.apple.com/us/podcast/hybrid-vs-owen-pallett-feat-gareth-coker/id1501267072?i=1000508755703)
11 [coker/id1501267072?i=1000508755703](https://podcasts.apple.com/us/podcast/hybrid-vs-owen-pallett-feat-gareth-coker/id1501267072?i=1000508755703), Gareth Coker (composer for film and games including
12 Ori and the Blind Forest, Ori and the Will of the Wisps, ARK: Survival Evolved, Immortals
13 Fenyx Rising, and Halo Infinite) from 3:42 to 11:52 makes clear how heavily he has relied upon
14 incorporating Halo themes such as the “Monks’ Chant”. In this interview, especially from 7:51-
15 9:35, Coker points out the use of the iconic Halo work covered in the ICA and its amendments
16 and goes further to state that this incorporation of themes was done at the direction of 343
17 Industries.

18 32. ODS is entitled to its fees and costs in following up on the outstanding discovery
19 and preparing the current motion to compel discovery.
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INTERROGATORIES AND REQUESTS FOR PRODUCT - 7
(2:20-cv-00882-MLP)

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1 THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY
2 KNOWLEDGE, SO STATED UNDER PENALTY OF PERJURY UNDER THE LAWS OF
3 THE STATE OF WASHINGTON AND THE UNITED STATES OF AMERICA.

4
5 DATED this 11th day of March, 2021.

6 s/ Mark Lawrence Lorbiecki

7 Mark Lawrence Lorbiecki, WSBA # 16796
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14 *Attorneys for Plaintiff/Counterclaim*
15 *Defendant O'Donnell/Salvatori, Inc.*

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O'DONNELL/SALVATORI, INC.'S FIRST SET OF
INTERROGATORIES AND REQUESTS FOR PRODUCT - 8
(2:20-cv-00882-MLP)

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send electronic notification of such filing to all CM/ECF participants.

DATED this 11th day of March, 2021.

s/ Mark Lawrence Lorbiecki
Mark Lawrence Lorbiecki, WSBA # 16796

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INTERROGATORIES AND REQUESTS FOR PRODUCT - 9
(2:20-cv-00882-MLP)

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